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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

STEPHEN MORRIS and KELLY
McDANIEL, on behalf of themselves and all
others similarly situated.

Plaintiffs.

V.

ERNST & YOUNG, LLP, and ERNST & YOUNG U.S., LLP,

Defendants.

Case No. 12-cv-04964-RMW (HRL)

[Assigned for all purposes to Judge Ronald M. Whyte]

**SECOND STIPULATION AND
[PROPOSED] ORDER TO EXCEED
APPLICABLE PAGE LIMIT FOR
MOTION TO DISMISS, OR IN THE
ALTERNATIVE, STAY PROCEEDINGS
AND COMPEL ARBITRATION
BRIEFING**

Date: February 15, 2013

Time: 9:00 a.m.

Ctrm: 6

1 WHEREAS the parties have met and conferred and agreed to each exceed the applicable page
 2 limit for the opposition and reply briefing to the Defendants' **MOTION TO DISMISS, OR IN THE**
 3 **ALTERNATIVE, STAY PROCEEDINGS AND COMPEL ARBITRATION** by ten (10) pages.

4 WHEREAS a Stipulation and [Proposed] Order To Exceed Applicable Page Limit For Motion
 5 To Dismiss, Or In The Alternative, Stay Proceedings and Compel Arbitration Briefing (the
 6 "Stipulation") was filed on January 23, 2013 (Dkt. No. 43).

7 WHEREAS the Court denied without prejudice to re-file the Stipulation for failure to include in
 8 the Stipulation the reasons, consistent with Civil Local Rule 7-11(a), for seeking to exceed the page
 9 limits (Dkt. No. 46).

10 WHEREAS Plaintiffs believe the reasons necessary to submit a memorandum exceeding the
 11 page limit up to an additional ten (10) pages includes a significant and extensive judicial history
 12 interpreting the very arbitration agreement at issue that was not addressed in Defendants' motion. This
 13 includes, Plaintiffs maintain, finding the subject agreement unenforceable in circumstances which
 14 while different in some respects are sufficiently similar to control the result here. Hence, the need for
 15 additional pages to address the numerous issues include the following reasons:

- 16 1. First, the agreement Defendants seek to enforce does not provide for shifting of costs and
 17 expense, or in other words allow for arbitrator discretion, where the relevant statutes
 18 unconditionally require costs and expenses to be shifted to the employer. See, *Sutherland*
 19 *v. Ernst & Young LLP*, 768 F.Supp.2d 547 (S.D.N.Y. 2011) ("Sutherland I"); *Sutherland v.*
 20 *Ernst & Young LLP*, 2012 U.S. Dist. LEXIS 5024 (S.D.N.Y. January 13, 2012) ("Sutherland
 21 II");
- 22 2. Second, the history includes this Court's finding of waiver by Defendant of a claim to
 23 arbitration in *Ho v. Ernst & Young, LLP*, a putative class action in which both Plaintiffs
 24 were putative class members and which Plaintiff Morris participated, *inter alia*, by giving a
 25 declaration and sitting for a deposition. See, *Ho v. Ernst & Young, LLP*, 2011 U.S. Dist.
 26 LEXIS 106658 (N.D. Cal. Sept. 20, 2011), *Order Denying Motion for Leave to Move For*
 27 *Reconsideration* (*Ho* Dkt. No. 302, October 19, 2011). Whether such waiver applies to all

1 putative class members, or at least to those, like Mr. Morris, who specifically identified his
 2 personal dispute with Defendant and was subjected to discovery, apparently is an issue of
 3 first impression;

4 3. Third, the cost of proceeding in individual arbitration proceedings under the arbitration
 5 agreements at issue here have been found to be so high that individual arbitration would not
 6 allow the participants to “effectively vindicate their statutory rights.” See *Sutherland I*
 7 and *Sutherland II*. Where arbitration must be conducted on an individual basis, but class
 8 proceedings in Court would allow those statutory rights to be vindicated. See also, *Italian*
 9 *Colors Rest. v. Am. Express Travel Related Servs. Co. (In re Am. Express Merchs. Litig.)*,
 10 667 F.3d 204 (2d Cir. 2012)(“Amex III”), *Nat'l Supermarkets Assoc. v. Am. Express Travel*
 11 *Related Servs. Co. (In re Am. Express Merchants' Litig.)*, 634 F.3d 187, 2011 U.S. App.
 12 LEXIS 4507 (2d Cir., 2011)(“Amex II”), and *In re Am. Express Merchs. Litig.*, 554 F.3d 300
 13 (2d Cir. 2009)(“Amex I”)(collectively hereinafter the “Amex Trilogy”); *Coneff v. AT&T*
 14 *Corp.*, 673 F.3d 1155, 1159 (9th Cir. Wash. 2012);
 15 4. Fourth, Plaintiffs maintain the findings in *Sutherland II* could be collateral estoppel;
 16 5. Fifth, Plaintiffs maintain the National Labor Relations Board holding in *D.R. Horton, Inc. v.*
 17 *Cuda*, NLRB Case No. 12-CA-25764, 357 NLRB No. 184, (Jan. 3, 2012) that a
 18 class/collective action waiver imposed in an agreement required as a condition of
 19 employment to be a violation of Section 7 of the National Labor Relations Act and a
 20 violation of the *Norris LaGuardia Act* deserves deference. Accordingly, Plaintiffs need to
 21 address those issues; and
 22 6. Sixth, the Plaintiffs will seek to address the issue of waiver not only as a choice of law issue
 23 as touched upon in *Ho v. Ernst & Young, LLP*, 2011 U.S. Dist. LEXIS 106658 (N.D. Cal.
 24 Sept. 20, 2011), but also the separate issue of waiver by moving to compel arbitration only
 25 after seeking to transfer this matter from a sister court and then seeking to relate the matter
 26 to other cases.

1 WHEREAS, Defendants do not oppose Plaintiffs' request for additional pages, but seek an
2 equal extension for the reply in the event the Court grants Plaintiffs' request.

3 THEREFORE IT IS HEREBY STIPULATED by and between the parties hereto through their
4 respective undersigned counsel that:

5 1. Plaintiffs shall have up to thirty-five (35) pages for their Memorandum of Points and
6 Authorities In Opposition to Defendant's Motion To Dismiss, Or In the Alternative, Stay Proceedings
7 and Compel Arbitration; and

8 2. Defendants shall have up to twenty-five (25) pages for their Memorandum of Points and
9 Authorities In Reply to Plaintiffs' To Memorandum of Points and Authorities In Opposition to
10 Defendant's Motion To Dismiss, Or In the Alternative, Stay Proceedings and Compel Arbitration.

11 Dated: January 24, 2013

/s Ross L. Libenson

12 Ross L. Libenson
13 HOFFMAN LIBENSON SAUNDERS & BARBA
14 Attorney for Plaintiffs

15 Dated: January 24, 2013

/s Gregory W. Knopp

16 GREGORY W. KNOPP
17 AKIN GUMP STRAUSS HAUER &
18 FELD LLP
19 Attorney for Defendant

(*This stipulation has been approved by Gregory W. Knopp*)

20 Because the court has agreed to extend the filing deadline for the opposition papers to Monday,
21 January 28, the court likewise extends the filing deadline for the reply papers to Monday, February 4.

22 **ORDER**

23 PURSUANT TO STIPULATION IT IS SO ORDERED.

24 Dated: January 25, 2013

25 
26 United States District Judge